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12 AMBU SDN. BHD.  
13

14 UNITED STATES DISTRICT COURT  
15  
16 SOUTHERN DISTRICT OF CALIFORNIA  
17

18 THE LARYNGEAL MASK COMPANY  
19 LTD. and LMA NORTH AMERICA,  
20 INC.,

21 Plaintiffs,

22 v.

23 AMBU A/S, AMBU INC., AMBU LTD.,  
24 and AMBU SDN. BHD.,

25 Defendants.  
26

27 AND RELATED COUNTERCLAIMS  
28

Case No. 07-cv-1988-DMS (NLS)

**AMBU'S *EX PARTE* REQUEST TO  
CONTINUE APRIL 14, 2008  
ENE CONFERENCE**

Judge: Hon. Nita L. Stormes

29 Defendants Ambu A/S, Ambu Inc., Ambu Ltd., and Ambu Sdn. Bhd. (collectively,  
30 "Ambu"), respectfully request that the Court continue the Early Neutral Evaluation ("ENE")  
31 Conference currently set for April 14, 2008. The February 26, 2008 Order Setting ENE  
32 Conference states that the Court "will consider formal, written *ex parte* requests to continue an  
33 ENE conference when extraordinary circumstances exist that make a continuance appropriate."  
34 Ambu respectfully submits that such circumstances exist here in light of the recent substitution of  
35 counsel mandated by the Court's February 25, 2008 Order.

36 This case was filed on October 15, 2007. On February 25, 2008, Judge Sabraw granted

37 AMBU'S *EX PARTE* REQUEST TO  
38 CONTINUE ENE CONFERENCE

CASE NO. 07-CV-1988-DMS

1 Plaintiff's Motion to Disqualify Finnegan Henderson Farabow Garrett & Dunner, LLP as  
2 Defendants' Counsel (Docket No. 41, the "Disqualification Order"). Accordingly, four and a half  
3 months into the case, Ambu lost the services of its original counsel of record.

4 The February 25 Disqualification Order directed Ambu to "promptly locate new counsel."  
5 Ambu did so, filing a Substitution of Counsel and Proposed Order on March 17, 2007. The  
6 Disqualification Order also directed that "Finnegan Henderson Farabow Garrett & Dunner, LLP .  
7 . . shall not consult or share work product with new counsel." Disqualification Order at 13.  
8 Under the literal terms of the Disqualification Order, Ambu's new trial counsel must therefore  
9 start case preparation from scratch, as though the case had been newly filed against Ambu.

10 Recognizing that its Order might place Ambu at a disadvantage in preparing for the Early  
11 Neutral Evaluation Conference required in patent cases, the Disqualification Order states that "if .  
12 . . the new attorney requires time to prepare for the ENE, they may contact the Magistrate Judge  
13 for an additional continuance." Ambu accordingly requests that the Court continue the ENE  
14 Conference for 90 days.

15 Attorney preparation for the ENE Conference is necessarily extensive. Local Patent Rule  
16 2.1 and the Court's Order Setting ENE Conference at 1 indicate that the ENE Conference will  
17 involve a discussion of "every aspect of the lawsuit." Among other things, the parties must meet  
18 and confer under Federal Rule of Civil Procedure 26(f) prior to the ENE Conference, pursuant to  
19 which the parties must work out a discovery plan based upon the subjects of discovery likely to  
20 be needed, including a plan for electronic discovery. *See* Patent L.R. 2.1.a; Order Setting ENE  
21 Conference at 3; FED. R. CIV. P. 26(f). In addition, counsel appearing at an ENE Conference in a  
22 patent case, as in any other type of case in which such a conference is held, must be prepared to  
23 "discuss the claims and defenses" and have the "authority to discuss and enter into settlement."  
24 Patent Local Rule 2.1.a, incorporating Civil Rule 16.1.c.1.

25 The ENE Conference is currently set less than one month away. Ambu will be at a severe  
26 disadvantage unless Ambu's new counsel is given adequate time to analyze the patents-in-suit  
27 and to investigate Ambu's claims and defenses, including invalidity defenses based on prior art,  
28 prepare a discovery plan (which must account for the logistical challenges associated with

1 discovery from some defendants who are not located in the United States), and assess the many  
2 factors that impact the likelihood of an amicable resolution.

3 In particular, the Disqualification Order appears to preclude new counsel from contacting  
4 the Finnegan firm about this matter or using any of that firm's work product, which may include  
5 publicly available prior art and documents previously collected from the clients, which include  
6 entities in U.S., Europe and Asia. Ambu will be filing a motion before Judge Sabraw for  
7 clarification of the Court's Disqualification Order, to ask for direction as to whether, in  
8 connection with complying with Rule 26, Ambu's new counsel may obtain copies of any Ambu  
9 client documents or public third party prior art documents currently in the possession of the  
10 Finnegan firm. New counsel otherwise will have to perform its own prior art search and re-  
11 aggregate Ambu's documents from their clients. The additional time requested will allow Ambu  
12 opportunity to seek such clarification. Even if this access to such non-work product  
13 documentation is permitted, however, a continuance will still be necessary to permit Ambu's new  
14 counsel to review such materials to prepare for the ENE Conference.

15 Accordingly, Ambu respectfully requests that this Court continue the ENE Conference 90  
16 days from the date of Fenwick's appearance, to a date not earlier than June 16, 2008. This 90 day  
17 extension is appropriate not only in light of the above reasons, but Ambu respectfully notes that  
18 the original ENE conference was set more than 90 days after the complaint was served.

19 Pursuant to Local Rule 7.1.g.2, Ambu has contacted plaintiffs to obtain their concurrence  
20 in this request, but have not received a final response as of the filing of this request. *See*  
21 Declaration of Charlene M. Morrow in Support of Ambu's *Ex Parte* Request to Continue ENE  
22 Conference, ¶ 3.

23 Dated: March 18, 2008

Respectfully submitted,  
FENWICK & WEST LLP

25 By: /s/Darryl M. Woo  
26 Darryl M. Woo

27 Attorneys for Defendants  
28 AMBU A/S, AMBU INC., AMBU LTD., and  
AMBU SDN. BHD.

**CERTIFICATE OF SERVICE**

I hereby certify that on March 18, 2008, I caused the foregoing **AMBU'S EX PARTE REQUEST TO CONTINUE APRIL 14, 2008 ENE CONFERENCE** to be filed with the Clerk of the Court using the CM/ECF system which will send electronic notification of such filing to the applicable registered filing users.

VIA ECF:

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I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Dated: March 18, 2008

  
C. J. Alice Chuang

LIT/1282074

FENWICK & WEST LLP  
ATTORNEYS AT LAW  
MOUNTAIN VIEW